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In the Supreme Court of the United States

OCTOBER TERM, 1956

SAM ACHILLI, *Petitioner*

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinions of the Court of Appeals (Pet. A-1—A-20) are reported at 234 F. 2d 797.

JURISDICTION

The judgment of the Court of Appeals was entered on June 5, 1956 (Pet. A-16), a petition for rehearing was denied on July 31, 1956 (Pet. A-20), and a motion for leave to proceed in the trial court to file a motion to correct the sentence was denied on August 13, 1956 (Pet. A-24). On August 23, 1956, Mr. Justice Minton

extended the time for filing a petition for certiorari to September 20, 1956. The petition for a writ of certiorari was filed on September 17, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. 1254. (Pet. 3.)

QUESTIONS PRESENTED

1. Whether a United States Attorney is required, in a criminal prosecution for income tax evasion, to reconstruct income by the same method used by the Commissioner in determining the civil tax liability.

2. Whether the Court of Appeals properly exercised its function in reviewing the record in order to determine whether there was substantial evidence to support the inclusion of certain assets in petitioner's closing net worth.

3. Whether the Government sustained its burden of showing that the petitioner's net worth increases arose from current taxable income.

4. Whether the trial court erred in refusing a tendered instruction relating to the defense that embezzled funds do not constitute taxable income.

5. Whether certain remarks made by the prosecutor on summation deprived petitioner of a fair trial.

6. Whether the trial court erred in imposing upon petitioner, under Section 145(b) of the Internal Revenue Code of 1939, a sentence in excess of that which could have been imposed under Section 3616(a) of the Code.

STATUTES INVOLVED

Internal Revenue Code of 1939:

SEC. 41. GENERAL RULE.

The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income. If the taxpayer's annual accounting period is other than a fiscal year as defined in section 48 or if the taxpayer has no annual accounting period or does not keep books, the net income shall be computed on the basis of the calendar year.

(26 U.S.C. 1952 ed., Sec. 41.)

SEC. 145. PENALTIES.

* * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000,

or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * *

(26 U.S.C. 1952 ed., Sec. 145(b).)

SEC. 3616. PENALTIES.

Whenever any person—

(a) *False returns.* Delivers or discloses to the collector or deputy any false or fraudulent list, return, account, or statement, with intent to defeat or evade the valuation, enumeration, or assessment intended to be made

* * *

he shall be fined not exceeding $1,000, or be imprisoned not exceeding one year, or both, at the discretion of the court, with costs of prosecution.

(26 U.S.C. 1952 ed., Sec. 3616(a).)

STATEMENT

On March 4, 1953, a three-count indictment was filed against the petitioner in the United States District Court for the Northern District of Illinois. In counts one and two he was charged with wilfully attempting to evade a large part of his individual income taxes for the years 1946 and 1947, respectively, and in count three with wilfully attempting to evade a portion of his own and his wife's income tax for 1948, in violation of Section 145(b), Internal Revenue Code of 1939. The indictment charged that the means of evasion had been the filing of false and fraudulent returns understating his net income in each year. The amounts of net income and the taxes due on it, as reported in the returns and as charged, are as follows (R. 3-5):

	Reported		Corrected	
	Net Income	Tax	Net Income	Tax
Count I (1946)	$11,753.96	$2,780.15	$44,254.60	$20,856.74
Count II (1947)	16,785.52	4,620.98	70,785.75	39,454.76
Count III (1948)	34,053.12	8,968.52	52,805.05	17,997.25

A mistrial was declared on November 22, 1954 (R. 42) after a witness had testified to petitioner's previous imprisonment (R. 43). In the second trial, on May 11, 1955, after nineteen days of trial the jury found the petitioner guilty as charged. (R. 1171.) A motion for a judgment of acquittal or, in the alternative, for a new trial was denied on May 27, 1955. (R. 1210-1211.) On June 16, 1955, the petitioner was sentenced to concurrent two-year prison terms on each count and was fined $6,000. (R. 1212-1213.) The Court of Appeals affirmed the conviction as to counts two and three and reversed as to count one on the Government's concession that an asset of $11,000 had been omitted from the computation of petitioner's opening net worth for 1946. (Pet. A-8, A-16.)

The evidence to support the verdict may be summarized briefly as follows:

The Government's proof of unreported income consisted of (1) direct evidence of petitioner's receipt of substantial amounts of unreported income, and (2) evidence of net worth increases and expenditures substantially in excess of reported income.

(1) Late in 1944 petitioner and one Gromer, a practicing lawyer, formed a partnership known as Highland Motor Sales, each investing $6,000, and obtaining an $18,000 bank loan. The firm acquired a franchise for the sale of Chrysler automobiles. Petitioner

was the active head of the business and had supervision of the books and records. (R. 796-802.)

Fifty-three witnesses testified that they had purchased a total of 134 automobiles from Highland Motor Sales during the prosecution years. All of them had dealt either with petitioner or his sales manager. (R. 123-465.) In each instance the sale was either omitted from the books entirely or the selling price was understated on the books. (R. 925-944.) This unrecorded income, which was reported on neither the partnership return or petitioner's return (R. 83, 91-94, 802-806), totalled the following amounts (R. 944):

1946	$14,955.10
1947	36,131.55
1948	21,068.00

The Government's evidence also showed that petitioner had received interest income and income from the discounting of notes, none of which was reported on the returns. (R. 585-589, 776-781, 864-865; Ex. Vol., pp. 7-8, 11-12.)

(2) The net worth starting point evidence included proof that during the years 1930 through 1945 petitioner paid income taxes totalling $2,699.77 (R. 921-923); that he had received no gifts or inheritances but his wife had realized $720.10 from her mother's estate in 1943 (R. 877-878, 879-881, 917); that his visible net worth at the beginning of the prosecution years was $33,815.56 (Ex. Vol., pp. 70-71); and that he admitted that he had had no undeposited cash on hand (R. 959).

In view of the possibility that petitioner might be accountable to his inactive partner for one-half of the

unrecorded and unreported receipts from the sale of cars, the Government's computations of income on the net worth-expenditures method took into account a liability running from petitioner to the partner of 50% of such receipts. After this adjustment the net worth proof showed that petitioner had realized unreported income of $13,803.94 in 1946; $36,958.63 in 1947, and $20,623.18 in 1948. (R. 944-946, 957-959; Ex. Vol., pp. 70-74.)

ARGUMENT

1. Petitioner's main contention (Pet. 3, 13-18) is that the United States Attorney is bound, in a criminal prosecution for income tax evasion, by the "method of accounting" selected by the Commissioner of Internal Revenue in determining the civil tax liability; and that if the Commissioner does not use the net worth method for that purpose, all evidence of the defendant's net worth is inadmissible upon the criminal trial. The contention is plainly devoid of merit.

Petitioner relies upon Section 41 of the Internal Revenue Code of 1939 (*supra*, p. 3). He argues that the record shows that the Commissioner has not determined the civil liability by the net worth method but has made specific adjustments to items of income and deductions; that it must be assumed that he has found that these adjustments "clearly reflect the income"; and that the prosecutor has no right to "disregard the Commissioner's findings * * *." (Pet. 14-16.) Assuming, *arguendo*, that it appears that the civil liability has been determined by a method other than the net

worth method,[1] it does not follow that the prosecutor is thereby restricted in the kind of evidence he may offer at the trial of the indictment. Only recently, in *Holland* v. *United States*, 348 U.S. 121, this Court had occasion to reject a similar contention based on Section 41. The Court said (pp. 131-132):

> The provision that the "net income shall be computed * * * in accordance with the method of accounting regularly employed in keeping the books of such taxpayer," refers to methods such as the cash receipts or the accrual method, which allocate income and expenses between years. *United States* v. *American Can Co.*, 280 U.S. 412, 419. The net worth technique, as used in this case, is not a method of accounting different from the one employed by defendants. It is not a method of accounting at all, except insofar as it calls upon taxpayers to account for their unexplained income. * * * Certainly Congress never intended to make § 41 a set of blinders which prevents the Government from looking beyond the self-serving declarations in a taxpayer's books. * * * To protect the revenue from those who do not "render

[1] However, the record does not show that the civil tax determination here was based on a method other than the net worth method. True, the deficiency notices list specific disallowances of deductions and add specific items of unreported income (many of which do not properly lend themselves to a charge of criminal fraud), but with respect to the largest item in each year they show only a designation of "Other Income" with the explanation, e.g., that "It is determined that you received during the year of 1946 income in the amount of $100,963.99 which you did not include in the return you filed." (R. 23-24, 27-28, 31-32.) There is no reason to believe that this amount and the corresponding amounts for 1947 and 1948 ($95,000 and $23,704.94, respectively) were not determined on the basis of the agent's net worth computations.

true accounts," the Government must be free to use all legal evidence available to it in determining whether the story told by the taxpayer's books accurately reflects his financial history.

Petitioner's argument arises from a confusion of the civil and criminal aspects of the revenue laws.[2] Civil tax cases are disputes between the taxpayer and the Commissioner. The question is the exact amount of tax owed, and the burden of proof rests upon the taxpayer to show that the Commissioner's determination is erroneous. In criminal cases, of course, the burden of proof is on the Government, but the Government need only prove that the defendant fraudulently evaded some of the tax. Cf. *United States* v. *Johnson*, 319 U.S. 503, 517. There may well be cases, in view of these fundamental differences, in which the method of reconstructing income for criminal purposes is different from that which the Commissioner finds appropriate for the determination of the civil liability.[3] The United States Attorney "must be

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[2] Petitioner's argument is closely akin to the contention that in an income tax evasion prosecution the Government must put into evidence a determination of the defendant's civil tax liability by the Commissioner. See *Ford* v. *United States*, No. 180, this Term. This argument has long been discredited. *Guzik* v. *United States*, 54 F. 2d 618, 619 (C.A. 7th), certiorari denied, 285 U.S. 545; *Commerford* v. *United States*, 64 F. 2d 28, 30 (C.A. 2d), certiorari denied, 289 U.S. 759.

[3] The deficiency notices issued to petitioner reflect the disallowance of many deductions and losses claimed on the returns on the ground that petitioner had no records to substantiate them, as well as technical adjustments relating to such items as excessive depreciation and capital gains and losses. (R. 23-24, 27-28, 31-32.) Obviously, in the absence of proof of fraud, these items would be quite inappropriate for inclusion in the criminal case.

free to use all legal evidence available to" him. (*Holland* v. *United States*, *supra*, p. 132.)

2. Petitioner argues (Pet. 18-21) that there was conflicting testimony with respect to the propriety of including certain items in his closing net worth, and urges that the Court of Appeals, because it can undertake a "more exacting and leisurely examination" of the record than the jury could (Pet. 4), should have resolved such conflicts. This is not the function of an appellate court. *Taylor* v. *Mississippi*, 319 U.S. 583, 585-586; *Abrams* v. *United States*, 250 U.S. 616, 619; *Burton* v. *United States*, 202 U.S. 344, 373. Its function is to determine whether there is substantial evidence, taking the view most favorable to the Government, to support the verdict. *Glasser* v. *United States*, 315 U.S. 60, 80. The Court of Appeals reviewed the record in the light of petitioner's contentions and found them to be without merit. (Pet. A-9—A-11.) The record supports that conclusion.

Petitioner implies (Pet. 19) that the inclusion in his closing net worth of certain equipment purchased in 1947 was improper, because it was "contracted for by Red Lion, Inc.", a night club (Ex. Vol. pp. 46, 47, 50, 52). There was evidence, however, that petitioner purchased the equipment and signed the contracts; and that the words "Red Lion, Inc." were placed there not to fix liability but for the purpose of identifying the place of business in which the equipment was to be used. (R. 578-583.) Petitioner owned the real estate and spent substantial sums on its improvement. (R. 520-523, 945-946, 949.) It appears that he also

owned the equipment, for he claimed depreciation on it in both 1947 and 1948. (Ex. Vol., pp. 8, 12.)

With respect to three other items, as to which petitioner mentions only the amounts (Pet. 19), there was also substantial evidence in the record justifying their inclusion in his closing net worth (R. 541-542, 545, 644-647, 762-764, 865, 867, 1024-1027, 1032). The Court of Appeals correctly concluded that the Government's treatment of these items was entirely proper. (Pet. A-9—A-11.)

3. Petitioner contends (Pet. 21-22) that the Government did not sustain its burden of showing that his net worth increases arose from a "likely source, from which the jury could reasonably find that [they] sprang" (*Holland* v. *United States*, 348 U.S. 121, 137-138). He argues that the Government's case must fail because the disposition of the unreported income proved by direct evidence of specific automobile sales (*supra*, p. 6) was not traced into the acquisition of assets.[4] We think this argument, in the circumstances of this case, borders on the frivolous. There is no burden on the Government to prove the precise source

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[4] Petitioner argues (Pet. 21) that the evidence shows affirmatively that the unreported income from automobile sales did not find its way into his assets because such assets were all paid for by check rather than currency. Nothing in the record, however, obviates the likelihood that petitioner deposited the suppressed sales receipts into his bank accounts and [illegible] used them to acquire assets. If petitioner's argument ha[illegible] it, it seems clear that his true unreported income would h[illegible] co[illegible]prised of the total of the net worth increases and the rec[illegible]s from suppressed sales since, under his theory, the latter formed no part of the former. Of course the case was not submitted to the jury on any such theory.

of the funds reflected in increased net worth. The requirement is that the Government adduce "evidence supporting the inference that the defendant's net worth increases are attributable to currently taxable income." (*Holland* v. *United States, supra,* p. 137.) One way of doing that is to show evidence of a "likely source" of taxable income. Here the Government proved a positive source of a large part of the unreported income, and in addition adduced evidence (which was not present in the *Holland* case) tending to negative the receipt of gifts and inheritances. (*Supra,* p. 6.) Whatever the merits of petitioner's argument in the abstract, it can hardly be made in this case, where the record contains evidence overwhelmingly establishing that the funds in question dervied from current taxable sources.

4. The contention (Pet. 22-24) that the unreported income may have constituted embezzled, hence nontaxable, funds is clearly without merit.[5] Petitioner relies wholly upon *Commissioner* v. *Wilcox,* 327 U.S. 404. This Court has specifically limited the holding to the particular facts of that case. *Rutkin* v. *United States,* 343 U.S. 130, 138. Under the *Rutkin* case a gain is taxable "when its recipient has such control over it that, as a practical matter, he derives readily realizable economic value from it." (343 U.S. at 137.)

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[5] The point was raised in the trial court by petitioner's requesting two instructions on the subject, both of which were refused. (R. 1126, 1128.) We submit that the vague and misleading language of both instructions would in itself have been sufficient grounds for their rejection.

Moreover, as has been shown (*supra*, pp. 6-7), petitioner was credited in the net worth reconstruction with a liability in the amount of 50% of the suppressed receipts from car sales, *i.e.*, the amounts which he had wrongfully diverted from his partner's share. The obvious effect was to treat as petitioner's income only his share of the suppressed receipts.

5. Petitioner states (Pet. 24-26) that his right to a fair trial was prejudiced by nineteen remarks of the prosecutor during summation. He points to no particular incident, nor does he attempt to explain wherein he was prejudiced. Seventeen of the remarks were not objected to. The Court of Appeals carefully considered the most important of these contentions in the light of the whole record and found that they "present for the most part nothing more than zealous advocacy" and that "they cannot be classified as misconduct requiring reversal." (Pet. A-5.) The record amply justifies that conclusion. See *Malone* v. *United States*, 94 F. 2d 281, 288 (C.A. 7th), certiorari denied, 304 U.S. 562; *DiCarlo* v. *United States*, 6 F. 2d 364, 368 (C.A. 2d).

6. Finally, petitioner raises questions (Pet. 26-31) as to the legality of his sentence and the validity of the indictment, pointing to the overlap between Sections 145(b) and 3616(a) of the Internal Revenue Code of 1939 (*supra*, pp. 3-4) as applied to the facts of this case. These contentions are similar to those made in *Doyle* v. *United States* and *Moran* v. *United States* (both pending on petitions for certiorari, Nos. 386 and 417, this Term). The points were not raised in

the trial court.[6] We agree that it is desirable that these questions (following in the wake of *Berra* v. *United States*, 351 U.S. 131) should be settled, but the Court may consider it appropriate to await the arrival of a case or cases in which they have been properly preserved. In the *Berra* case, where the defendant had called Section 3616(a) to the attention of the trial court by requesting an instruction to the jury, this Court (Justices Black and Douglas dissenting) found it unnecessary to decide whether the sentence was excessive. *A fortiori*, the question is not presented by the record in the instant case, on which it was not raised in the District Court in any manner. (Pet. A-17—A-20.)

CONCLUSION

For the reasons stated, the petition for certiorari should be denied.

Respectfully submitted,

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[6] Petitioner contends (Pet. 28) that he raised this issue by a pre-trial motion to dismiss. However, the Code provision there relied upon was not Section 3616(a) but Section 3761(a), relating to the compromise of civil tax liability. (R. 7.)

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